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Defendant WESTERN HERITAGE  
INSURANCE COMPANY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WESTERN HERITAGE INSURANCE  
COMPANY,

Plaintiff,

v.

NATIONAL SURETY CORPORATION;  
ASSOCIATED INDEMNITY  
CORPORATION; and DOES I-X,  
inclusive,

Defendants.

NATIONAL SURETY CORPORATION; and  
ASSOCIATED INDEMNITY  
CORPORATION,

Counter-Claimants,

v.

WESTERN HERITAGE INSURANCE  
COMPANY,

Counter-Defendant.

Case No. 2:14-cv-00118-KJD-VCF

MOTION FOR SUMMARY JUDGMENT ON  
BEHALF OF THE PLAINTIFF AND  
COUNTERDEFENDANT WESTERN  
HERITAGE INSURANCE COMPANY

COMES NOW plaintiff/counterdefendant Western Heritage  
Insurance Company (hereinafter "Western Heritage"), by and  
through its counsel Theodore J. Kurtz of Selman Breitman LLP and

hereby submits the following motion for summary judgment seeking an order from this court declaring that the defendants/counterclaimants National Surety Corporation (hereinafter "National Surety") and Associated Indemnity Corporation (hereinafter "Associated Indemnity") breached their duty to defend Donahue Schriber Realty Group LP (hereinafter "Donahue Schriber"), that they owe contribution and indemnity to Western Heritage for its defense of Donahue Schriber, and that the counterclaim against Western Heritage be dismissed. This motion is made pursuant to FRCP 56 and Local Rule 56-1, and based on all of the pleadings and papers on file herein, together with the following memorandum of points and authorities, the exhibits and affidavits attached hereto, and such arguments of counsel as the court may allow.

DATED: June 1, 2015

SELMAN BREITMAN LLP

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### MEMORANDUM OF POINTS AND AUTHORITIES

#### I. SUMMARY OF THE FACTS

Donahue Schriber, the direct insured of National Surety, owned the El Dorado Village Shopping Center. Donahue Schriber leased to Train Stop, Inc., (hereinafter "Papa John's Pizza"), the direct insured of Associated Indemnity, a building in El

1 Dorado Village. The lease between Papa John's Pizza and Donahue  
2 Schriber required Papa John's Pizza to, among other things,  
3 indemnify Donahue Schriber for any real or alleged damages or  
4 injuries from claims arising out of or connected with Papa John's  
5 use of the leased premises. Donahue Schriber is an additional  
6 insured on the Associated Indemnity policy issued to Papa John's  
7 Pizza. Both National Surety and Associated Indemnity are  
8 Fireman's Fund affiliated companies.

9 Malco Nevada, Inc. (hereinafter "Malco"), the direct insured  
10 of Western Heritage, entered into a contract with Donahue  
11 Schriber to, among other things, perform maintenance and cleaning  
12 at El Dorado Village. The contract between Malco and Donahue  
13 Schriber required, among other things, that Malco indemnify and  
14 defend Donahue Schriber against any and all claims for injury  
15 resulting from Malco's negligence or willful misconduct, except  
16 where such claim is the result of the sole gross negligence or  
17 willful misconduct of Donahue Schriber.

18 On September 3, 2005, Ms. Tyrin Salinas, an employee of Papa  
19 John's Pizza, while carrying the garbage to the dumpster in the  
20 rear of the Papa John's Pizza building, a common area of the  
21 leased premises, slipped and fell on algae that was located on  
22 the sidewalk she was walking on as she was proceeding to the  
23 dumpster. Ms. Salinas suffered personal injuries and sued  
24 Donahue Schriber and Malco in Nevada State Court (hereinafter  
25 "the underlying action").

26 Western Heritage provided a defense for Malco. The  
27 defendants herein, National Surety and Associated Indemnity,  
28 provided a defense for Donahue Schriber for approximately three

1 years and made equal settlement offers on behalf of Donahue  
2 Schriber. They then abandoned their defense of Donahue Schriber  
3 when Western Heritage accepted a tender of defense from the  
4 defendants on behalf of Donahue Schriber approximately four  
5 months before trial.

6 The contract between Malco and Donahue Schriber required  
7 Malco to pressure wash the sidewalks of the El Dorado Village  
8 during the first week of each month. Pursuant to the lease  
9 agreement between Donahue Schriber and Papa John's Pizza, Donahue  
10 Schriber remained responsible for all common areas. The algae on  
11 the sidewalk was the result of water leaking from the swamp  
12 cooler being used by Papa John's Pizza. This leak and the  
13 resulting algae had been present for a number of years prior to  
14 the slip and fall of Salinas on September 3, 2005.

15 Before the slip and fall of Salinas on September 3, 2005,  
16 the property manager of Donahue Schriber, Mr. Henry Avila, knew  
17 about the water and algae on the sidewalk. He knew this was part  
18 of the common area that Donahue Schriber was responsible to  
19 maintain in a safe condition. He also knew that the source of  
20 the water causing the algae was from the Papa John's swamp  
21 cooler. Mr. Avila did nothing about the water and algae other  
22 than telling the Papa John's representative to fix it. However,  
23 Papa John's did not do so and Mr. Avila never followed up with  
24 Papa John's about repairs. Additionally, Mr. Avila and Donahue  
25 Schriber did not exercise their right to fix the swamp cooler  
26 themselves and bill the tenant Papa John's for the repair,  
27 pursuant to the lease agreement. As further explained herein,  
28 the jury awarded Ms. Salinas \$2,181,750 which was apportioned 90%

1 to Donahue Schriber and 10% to Malco, and a joint and several  
2 judgment was entered against Donahue Schriber and Malco. There  
3 was no award against Papa John's Pizza.

4 During the underlying action, a third-party complaint was  
5 filed by Donahue Schriber against Papa John's Pizza. However,  
6 National Surety and Associated Indemnity authorized the dismissal  
7 of all causes of action against Papa John's Pizza to avoid  
8 getting into an expensive legal battle between two parties that  
9 they insured. Consequently, this third-party complaint was  
10 dismissed with prejudice.<sup>1</sup>

11 Additionally, during the underlying action, National Surety  
12 and Associated Indemnity agreed to make equal settlement offers  
13 on behalf of Donahue Schriber which were not accepted.

14 After the failed settlement attempt and once Papa John's  
15 Pizza could no longer be made a party to this litigation because  
16 of the dismissal with prejudice of the third-party complaint  
17 against Papa John's Pizza, National Surety and Associated  
18 Indemnity, approximately four months before the February 28, 2011  
19 trial, tendered the defense of Donahue Schriber to Western  
20 Heritage. This was after National Surety and Associated  
21 Indemnity had already been defending Donahue Schriber for  
22 approximately three years. Because the contract between Malco  
23 and Donahue Schriber qualified as an insured contract, Western

24  
25 <sup>1</sup> Because of the workers' compensation law, Malco could not file a third-party  
26 complaint against Papa John's Pizza. However, because of the independent  
27 indemnity contract between Donahue Schriber and Papa John's Pizza, Donahue  
28 Schriber could proceed with a third-party complaint. See *American Federal Savings v. Washoe County*, 106 Nev. 869 at 875 (1990). However, when National Surety and Associated Indemnity on behalf of Donahue Schriber voluntarily gave up that right, Papa John's Pizza could no longer be made a party to the underlying litigation.

1 Heritage accepted the tender of defense of Donahue Schriber.  
2 Once Western Heritage accepted the tender of defense, Associated  
3 Indemnity and National Surety abandoned their defense of Donahue  
4 Schriber, denied any indemnity obligation, closed the file, and  
5 refused to equally participate with Western Heritage in a  
6 settlement offer on behalf of Donahue Schriber.

7 In a letter to Western Heritage confirming their abandonment  
8 of the defense of Donahue Schriber, the representative of  
9 National Surety and Associated Indemnity explained that in his  
10 opinion Malco and Western Heritage would have to indemnify  
11 Donahue Schriber for any damages awarded against Donahue  
12 Schriber. However, such an opinion is clearly and blatantly  
13 incorrect because the defendants herein failed to properly  
14 consider the potential that the indemnity agreement between Malco  
15 and Donahue Schriber would not require Malco to indemnify Donahue  
16 Schriber for its own negligence. This would include the  
17 negligent conduct of Henry Avila, Donahue Schriber's own property  
18 manager, in failing to make safe the sidewalk after he became  
19 aware of the dangerous condition, because of the presence of  
20 algae on the sidewalk and his failure to ensure that the faulty  
21 Papa John's swamp cooler, which was the source of the water  
22 causing the algae was repaired.

23 After the defendants herein had abandoned their defense of  
24 Donahue Schriber, counsel for Tyrin Salinas in the underlying  
25 action served on January 7, 2011 separate offers of judgment for  
26 \$995,000 to Donahue Schriber and to Malco. Also, counsel for  
27 Tyrin Salinas in the underlying action sent a letter dated  
28 January 7, 2011 describing a global settlement demand in the sum



1 of \$995,000. The offers of judgment and the settlement demand  
2 were not accepted.

3 As a result of a jury trial, the personal injury plaintiff  
4 Tyrin Salinas was awarded \$2,181,750 and the jury apportioned 90%  
5 liability to Donahue Schriber and 10% liability to Malco. A  
6 joint and several judgment was entered against Malco and Donahue  
7 Schriber. Both Donahue Schriber and Malco appealed to the Nevada  
8 Supreme Court. The court remanded the case to the State District  
9 Court for a retrial on damages only which is presently scheduled  
10 for October 12, 2015.

## 11 II. SUMMARY OF ARGUMENT

12 By their conduct the two Fireman's Fund affiliated  
13 companies, National Surety and Associated Indemnity, have  
14 admitted that they have a duty to defend Donahue Schreiber and  
15 have breached that duty. Because of this breach, National Surety  
16 and Associated Indemnity must pay contribution and indemnity to  
17 Western Heritage and have no standing to pursue a counterclaim  
18 against Western Heritage for not settling the underlying action  
19 and proceeding to trial.

20 National Surety and Associated Indemnity must pay two-thirds  
21 of the past defense fees and costs paid by Western Heritage in  
22 defending Donahue Schriber in the underlying litigation.  
23 Additionally, these defendants must pay two-thirds of the past,  
24 non-bond related appeal attorneys' fees and costs paid by Western  
25 Heritage pertaining to the appeal of Donahue Schriber.  
26 Furthermore, these defendants must fully indemnify and pay for  
27 90% of all damages awarded to Tyrin Salinas in the underlying  
28 action without any contribution from Western Heritage or Malco.

1       The 90% negligence apportioned to Donahue Schriber came from  
2       its own negligence for which it does not deserve to be  
3       indemnified by either Malco or Papa John's Pizza, or it arose  
4       from the negligence of Papa John's Pizza, in which Papa John's  
5       Pizza should be indemnifying Donahue Schriber. It is only  
6       because the National Surety and Associated Indemnity sacrificed  
7       Donahue Schriber's indemnity rights against Papa John's Pizza  
8       that National Surety and Associated Indemnity are now looking to  
9       Western Heritage to pay for negligence which belongs to Donahue  
10      Schriber itself and/or Papa John's Pizza.

11       Additionally, National Surety and Associated Indemnity must  
12      fully pay for the cost of the appeal bond posted on behalf of  
13      Donahue Schriber without any contribution from Western Heritage  
14      or Malco. Also, these defendants must also pay for two-thirds of  
15      Donahue Schriber's defense fees and costs in the retrial of  
16      damages ordered by the Nevada Supreme Court.

17       Also, the counterclaim of the defendants alleging that  
18      Western Heritage must pay the full amount of all damages awarded  
19      against Donahue Schriber in the underlying action because Western  
20      Heritage failed to accept the \$995,000 global settlement demand  
21      which is allegedly within the Western Heritage \$1,000,000  
22      liability policy limit, must be dismissed because at the time the  
23      offers of judgment and the global settlement demand were made,  
24      these defendants/counterclaimants were in breach of their  
25      respective duty to defend. Additionally, the global settlement  
26      demand did not include the payment of the workers' compensation  
27      lien of \$8,615.49 which when combined with the \$995,000 demand  
28      would exceed the \$1,000,000 policy limit of the Malco policy.



1 Furthermore, the defendant's allegations that the attorney  
2 retained by Western Heritage mishandled the defense of Donahue  
3 Schriber are without merit. Western Heritage retained counsel to  
4 defend Donahue Schriber and as such, National Surety and  
5 Associated Indemnity are not considered to be his clients.

6 Additionally, the defendants knew about the trial strategy  
7 and knew how the actual trial was progressing because they hired  
8 an investigator to attend and report about the trial of the  
9 underlying action, but made no complaints against the attorney  
10 for Donahue Schriber until after the trial. Furthermore, it was  
11 the defendants themselves, through the defense counsel they  
12 retained to defend Donahue Schriber, who mishandled the defense  
13 of Donahue Schriber. The defendants, in order to avoid an  
14 expensive legal battle between two insured parties, voluntarily  
15 dismissed with prejudice the third-party complaint against Papa  
16 John's Pizza, who was the one responsible for allowing the swamp  
17 cooler to leak water onto the sidewalk which facilitated the  
18 growth of the algae upon which the plaintiff in the underlying  
19 action slipped and fell, and who owed express indemnity to  
20 Donahue Schriber for any claim arising out of the use of the  
21 leased premises.

22 The counterclaim of National Surety and Associated Indemnity  
23 must be dismissed and they must pay contribution to Western  
24 Heritage for the defense fees and costs Western Heritage incurred  
25 in defending Donahue Schriber and they must be held responsible  
26 for indemnifying Donahue Schriber for all liability apportioned  
27 to Donahue Schriber without any contribution from Western  
28 Heritage or Malco.

1     **III. STATEMENT OF UNDISPUTED FACTS**

2             Donahue Schriber leased building space to Papa John's Pizza  
3     in the El Dorado Village. The lease between Papa John's Pizza  
4     and Donahue Schriber required, among other things, that Papa  
5     John's Pizza shall "indemnify DONAHUE SCHRIBER for any real or  
6     alleged damages or injury from all claims[,] judgments,  
7     liabilities, costs expenses, including attorneys' fees and costs,  
8     arising out of or connected with Tenant's use of the Premises and  
9     its facilities..[.]" Further, DONAHUE SCHRIBER "shall not be  
10    liable for any damage or liability of any kind or for any injury  
11    to or death of persons or damage to property of Tenant or any  
12    other person occurring ... from any cause whatsoever related to the  
13    use, occupancy or enjoyment of the Premises by Tenant...[.]" (See  
14    Exhibit A.)

15            Donahue Schriber contracted with Malco to clean and maintain  
16    portions of the El Dorado Village, including power washing the  
17    sidewalk once a month. The contract between Malco and Donahue  
18    Schriber required, among other things, that the "CONTRACTOR  
19    (Malco) shall indemnify, defend and save harmless the COMPANY, ...  
20    from and against any and all loss, damage, injury, liability, and  
21    claims thereof for injury to or death of any person, ..., resulting  
22    from CONTRACTOR's negligence or willful misconduct with respect  
23    to the work, services or otherwise, CONTRACTOR's acts or  
24    negligence at the Center ..., except where such loss, damage,  
25    injury, liability, or claim is the result of the sole gross  
26    negligence or willful misconduct of any indemnitee and is not  
27    contributed to by any act of, or by any negligent performance or  
28    omission to perform some duty imposed by law or contract on

1 CONTRACTOR, any subcontractor or either's agent, or employee."  
2 (See Exhibit B.)

3 Donahue Schriber is the direct insured under the policy  
4 issued by National Surety and an additional insured under the  
5 policy issued by Associated Indemnity to Papa John's Pizza.  
6 (Please see paragraph 7 of National Surety's counterclaim against  
7 Western Heritage.)

8 Malco is the direct insured under the policy issued by  
9 Western Heritage.

10 On September 3, 2005, Tyrin Salinas, an employee of Papa  
11 John's Pizza, suffered personal injuries when she slipped on  
12 algae on a sidewalk in the common area of the leased premises as  
13 she was taking garbage from Papa John's Pizza to the garbage  
14 dumpster. On August 31, 2007, Ms. Salinas filed a complaint  
15 against Donahue Schriber. (See Exhibit C.) On October 16, 2008,  
16 Ms. Salinas filed an amended complaint against Donahue Schriber  
17 and Malco. (See Exhibit D.)

18 Mr. Henry Avila, the property manager of Donahue Schriber,  
19 testified that algae on the sidewalk had existed several years  
20 before the plaintiff fell on September 3, 2005. (See pp. 13, 14  
21 and 52 of Exhibit E.) He testified that Donahue Schriber had a  
22 duty to maintain the common areas in a reasonably safe condition.  
23 (See p. 47 of Exhibit E.) According to the lease agreement  
24 between Donahue Schriber and Papa John's Pizza, the sidewalks are  
25 part of the common area. (See Exhibit A.) He also testified  
26 that Malco performed power washing at the El Dorado Village once  
27 a month. (See p. 19 of Exhibit E.) He further testified that he  
28 never did ask Malco specifically to remove the algae from the

1 sidewalk. (See p. 14 of Exhibit E.) Mr. Avila testified that he  
2 knew the source of the water causing the algae was from the Papa  
3 John's swamp cooler because he went on the roof and actually  
4 observed water coming from the swamp cooler. (See p. 9 of  
5 Exhibit E.) He spoke to the manager of Papa John's Pizza and  
6 told him that the swamp cooler needed to be fixed and the manager  
7 advised that it would be taken care of. (See pp. 10-11 of  
8 Exhibit E.) Mr. Avila also testified that he did not follow up  
9 to ensure that Papa John's made the repair to the swamp cooler  
10 and that Donahue Schriber did not, itself, fix the swamp cooler  
11 and charge the repairs to Papa John's Pizza as allowed by the  
12 lease. (See p. 61 of Exhibit E.)

13 National Surety began defending Donahue Schriber its named  
14 direct insured. (See page 4258 of Exhibit F.)

15 In a letter dated October 2, 2009 from counsel retained by  
16 National Surety to Papa John's counsel, Jimmy Chin, the defense  
17 of Donahue Schriber was tendered to Papa John's Pizza. (See  
18 Exhibit G. Also, please see page 4256 of Exhibit F.)

19 On December 17, 2009, counsel retained by National Surety to  
20 defend Donahue Schriber filed a third-party complaint on behalf  
21 of Donahue Schriber against Papa John's Pizza. (See Exhibit H.)

22 On March 10, 2010, Associated Indemnity, the insurer of Papa  
23 John's Pizza, decided to accept the tender of defense of Donahue  
24 Schriber and to use the same defense counsel that National Surety  
25 had retained to defend Donahue Schriber. (See page 4255 of  
26 Exhibit F.)

27 On March 17, 2010, it was decided between the defendants  
28 National Surety and Associated Indemnity to dismiss the third-

1 party complaint against Papa John's Pizza, "...to avoid getting  
2 into an expensive legal battle between two parties we insure...."  
3 (See page 4253 of Exhibit F.)

4 On or about August 16, 2010, the acceptance of the tender of  
5 defense of Donahue Schriber by Associated Indemnity, the insurer  
6 of Papa John's Pizza was sent. (See page 4249 of Exhibit F.)

7 On August 18, 2010, Donahue Schriber's third-party complaint  
8 against Papa John's Pizza was dismissed with prejudice. (See  
9 Exhibit I.)

10 On August 31, 2010, National Surety and Associated Indemnity  
11 agreed to equally split their obligations to Donahue Schriber in  
12 the underlying action and made separate settlement offers to the  
13 underlying plaintiff on behalf of Donahue Schriber. (See pages  
14 4248 and 4249 of Exhibit F.) However, the offers were not  
15 accepted and on September 22, 2010, counsel retained by  
16 Associated Indemnity to defend Donahue Schriber tendered the  
17 defense of Donahue Schriber to Western Heritage. (See Exhibit  
18 J.)

19 According to the October 18, 2010 log note Associated  
20 Indemnity acknowledged that since the contract between its  
21 insured Papa John's Pizza is with the property owner Donahue  
22 Schriber, that it does not have any good risk transfer potential.  
23 (See page 4248 of Exhibit F.)

24 In a letter dated October 18, 2010, Western Heritage  
25 accepted the tender of defense of Donahue Schriber. However, it  
26 was requested that due to a medical situation that the law firm  
27 retained by National Surety and Associated Indemnity continue to  
28 represent Donahue Schriber until such time as counsel retained by



1 Western Heritage could substitute as counsel. (See Exhibit K.)

2 On December 9, 2010, a substitution of attorney was filed on  
3 behalf of Donahue Schriber pursuant to which the attorney  
4 retained by Western Heritage to represent Donahue Schriber was  
5 substituted in place of counsel retained by Associated Indemnity  
6 to defend Donahue Schriber. (See Exhibit L.)

7 The substitution of attorney occurred after counsel retained  
8 by National Surety and Associated Indemnity to defend Donahue  
9 Schriber had represented Donahue Schriber in motions in limine in  
10 preparation for trial which were decided on December 6, 2010.

11 (See Exhibit M.)

12 On or about December 13, 2010 the defendants closed the  
13 file. (See Exhibit F, p. 4247.)

14 On January 7, 2011, plaintiff's counsel in the underlying  
15 action served by mail and facsimile separate offers of judgment  
16 to Malco and Donahue Schriber each in the sum of \$995,000 which  
17 included all fees, costs, attorneys' fees and prejudgment  
18 interest, but did not include the workers' compensation lien that  
19 exceeded \$5,000. (See Exhibit N.)

20 Even though in the underlying litigation there was no record  
21 to show the amount of the workers' compensation benefits the  
22 underlying plaintiff received, she did testify in her deposition  
23 that she received \$8,615.49 in workers' compensation benefits.

24 (See Exhibit O, page 5.)

25 Additionally, in a letter dated January 7, 2011, from  
26 counsel for the plaintiff in the underlying action to counsel for  
27 Donahue Schriber and counsel for Malco a global settlement demand  
28 was made for a total sum of \$995,000. However, this global

1 demand did not address the workers' compensation lien which is in  
2 excess of \$5,000. (See Exhibit P.)

3 The liability limit of the Western Heritage policy issued to  
4 Malco is \$1,000,000.

5 National Surety and Associated Indemnity knew about the  
6 offer of judgment to Donahue Schriber prior to the expiration of  
7 the offer. (See Exhibit Q.)

8 Additionally, National Surety and Associated Indemnity knew  
9 about the \$995,000 global settlement demand prior to the jury  
10 verdict dated March 11, 2011. (See page 4240 of Exhibit F.)

11 In a February 17, 2011 e-mail from the Western Heritage  
12 representative to the Associated Indemnity representative,  
13 Western Heritage requested that defendants herein share in the  
14 defense and indemnity of Donahue Schriber. They were  
15 specifically requested to contribute half of a settlement offer  
16 on behalf of Donahue Schriber. (See Exhibit R, page 3.)

17 In an e-mail dated February 17, 2011, the Associated  
18 Indemnity representative referred the Western Heritage  
19 representative to a letter that was mailed on February 9, 2011.  
20 (See Exhibit R, page 2.)

21 In response, the Western Heritage representative in an e-  
22 mail dated February 17, 2011 again requested an answer as to  
23 whether or not defendants herein were willing to contribute half  
24 of a settlement offer on behalf of Donahue Schriber. (See  
25 Exhibit R, page 2.)

26 In response, the Associated Indemnity representative, in an  
27 e-mail dated February 17, 2011, explained that he would not agree  
28 to a 50% contribution. (See Exhibit R, page 1.)

1 Then, in a response e-mail dated February 17, 2011, the  
2 Western Heritage representative stated,

3 Anything less than 50/50 is not acceptable.  
4 Since we are so close to trial, it seems  
5 we'll just have to settle our differences  
6 later. Your arguments for denying the tender  
7 are unfounded. Your insured has an  
8 obligation to Donahue Schriber, as you well  
9 know since you agreed to defend and indemnify  
10 them previously. Just because we have also  
11 agreed to do that does not eliminate your  
12 obligation.  
13 I will attempt to settle this matter, or try  
14 it if necessary, then we'll turn over to our  
15 recovery department to communicate with you.

16 (See Exhibit R, page 1.)

17 In a letter dated February 24, 2011 addressed to the  
18 plaintiff's counsel in the underlying action, a settlement offer  
19 was made on behalf of Donahue Schriber by Western Heritage. (See  
20 Exhibit S.)

21 Attached hereto as Exhibit T is a copy of an internal e-mail  
22 from the Western Heritage representative describing the  
23 evaluation of the plaintiff's underlying case which confirms that  
24 counsel representing Malco and counsel representing Donahue  
25 Schriber both evaluated the value of the plaintiff's case in the  
26 underlying action to be less than the \$995,000 global settlement  
27 demand.

28 Attached hereto as Exhibit U is a copy of the letter  
referenced by the Associated Indemnity representative in his e-  
mail of February 17, 2011 indicating that the letter had been  
mailed on February 9, 2011. (See Exhibit R, p. 2.) However, the  
letter attached hereto as Exhibit U is actually dated

1 August 9, 2010. Additionally, the letter attached hereto as  
2 Exhibit U is described in the log notes on page 4245 of Exhibit F  
3 with reference dates of 2/3/11 to 2/10/11. Consequently, the  
4 actual date on the letter attached hereto as Exhibit U is in  
5 error. However, this letter (Exhibit U) confirms that National  
6 Surety and Associated Indemnity were providing a defense to  
7 Donahue Schriber and then abandoned that defense. Exhibit U  
8 specifically explains that the defendants provided a defense for  
9 Donahue Schriber, "...up to the point that you [Western Heritage]  
10 accepted the tender from Donahue" and that anything that National  
11 Surety and Associated Indemnity may owe as the insurers of the  
12 property owner Donahue Schriber, "...should be paid back by Malco  
13 and its carrier."

14 As the underlying action proceeded towards trial, counsel  
15 retained by Western Heritage to defend Donahue Schriber provided  
16 defendants with an evaluation. (See Exhibit V.)

17 Additionally, National Surety and Associated Indemnity  
18 retained an investigator to attend and monitor the jury trial and  
19 report on the jury trial. (See page 4244 of Exhibit F.)

20 The jury trial of the underlying action began on  
21 February 28, 2011 and ended on March 11, 2011 with a jury verdict  
22 in the sum of \$2,181,750, which was apportioned 10% to Malco and  
23 90% to Donahue Schriber. A joint and several judgment was then  
24 entered against Donahue Schriber and Malco. (See Exhibit W.) The  
25 jury verdict was appealed by Donahue Schriber and Malco. Donahue  
26 Schriber posted a bond based upon the 90% apportionment and Malco  
27 posted a bond based upon the 10% apportionment. (See Exhibit X.)

28 A copy of the decision from the Nevada Supreme Court denying

1 the appeal concerning liability, but granting the appeal  
 2 concerning damages and ordering a new trial for damages is  
 3 attached hereto as Exhibit O.

4 The retrial of damages is presently scheduled for  
 5 October 12, 2015. (See Exhibit Y.)

6 **IV. STANDARDS FOR SUMMARY JUDGMENT**

7 Summary judgment is appropriate "if the pleadings, the  
 8 discovery and disclosure materials on file, and any affidavits  
 9 show that there is no genuine issue as to any material fact and  
 10 that the movant is entitled to judgment as a matter of law."  
 11 FRCP 56(c). A fact is "material" if it might affect the outcome  
 12 of a suit, as determined by the governing substantive law.  
 13 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct.  
 14 2505, 91 L.Ed.2d 202 (1986). An issue is "genuine" if sufficient  
 15 evidence exists such that a reasonable fact finder could find for  
 16 the non-moving party. *Villiarimo v. Aloha Island Air, Inc.*, 281  
 17 F.3d 1054, 1061 (9th Cir. 2002). Initially, the moving party  
 18 bears the burden of proving there are no genuine issues of  
 19 material fact. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898  
 20 (9th Cir. 2002). As described in this motion, defendant Western  
 21 Heritage has satisfied its burden to show that there is no  
 22 genuine issue of material fact.

23 **V. NATIONAL SURETY AND ASSOCIATED INDEMNITY BREACHED THEIR DUTY**  
 24 **TO DEFEND WHEN THEY ABANDONED THE DEFENSE OF DONAHUE**  
 25 **SCHRIBER AFTER WESTERN HERITAGE AGREED TO DEFEND**

26 National Surety and Associated Indemnity had been providing  
 27 a defense for Donahue Schriber for approximately three years  
 28 before the defense of Donahue Schriber was tendered to Western



1 Heritage in September 2010. According to the Nevada Supreme  
2 Court in *Benchmark Insurance Company v. Sparks*, 254 P.3d 617 at  
3 621 (Nev.2011) an insurer's duty to defend is triggered whenever  
4 the potential for coverage arises and continues until the  
5 potential for coverage ceases. The conduct of National Surety  
6 and Associated Indemnity in defending Donahue Schriber for  
7 approximately three years and making offers of settlement clearly  
8 confirms that National Surety and Associated Indemnity recognized  
9 that there was a potential for coverage for Donahue Schriber's  
10 alleged liability for the injuries to the plaintiff in the  
11 underlying action.

12 Based upon the undisputed facts, at no time did the  
13 potential for coverage of Donahue Schriber by National Surety and  
14 Associated Indemnity cease. The potential for coverage for  
15 Donahue Schriber under the National Surety and Associated  
16 Indemnity policies existed throughout the underlying action.  
17 Based on the conduct of Henry Avila, there was a potential that  
18 Donahue Schriber was itself liable for the underlying plaintiff's  
19 injuries for which Malco did not owe indemnity but for which Papa  
20 John's Pizza did. This is confirmed by the jury verdict which  
21 apportioned 90% of the liability for the injuries to the  
22 plaintiff in the underlying action to the conduct of Donahue  
23 Schriber.

24 The undisputed facts confirm that after Western Heritage  
25 agreed to defend Donahue Schriber, National Surety and Associated  
26 Indemnity abandoned their defense of Donahue Schriber and closed  
27 the file. This is a clear breach of the duty to defend Donahue  
28 Schriber. As explained by this court in *One Beacon Insurance*

1 Company v. Pro Builders Specialty Insurance Company, 2009 WL  
2 2407705 (D.Nev.2009) an insurance company which owes a defense to  
3 an insured cannot refuse to provide a defense because the insured  
4 is being defended by another insurer that also owes a duty to  
5 defend.

6 In support of their decision to abandon the defense of  
7 Donahue Schriber, National Surety and Associated Indemnity  
8 alleged that Western Heritage would have to pay all damages  
9 awarded to the plaintiff in the underlying action because they  
10 felt that any damages awarded against Donahue Schriber would have  
11 to be paid back by Malco pursuant to the indemnity agreement  
12 between Malco and Donahue Schriber. However, the indemnity  
13 agreement between Malco and Donahue Schriber did not require  
14 Malco to indemnify Donahue Schriber for Donahue Schriber's own  
15 negligence. See *Reyburn Lawn & Landscape Designers v. Plaster*  
16 *Development Company*, 255 P.3d 268 (Nev.2011). Consequently, the  
17 potential for coverage from National Surety and Associated  
18 Indemnity for the injuries suffered by the plaintiff in the  
19 underlying action never ceased and National Surety and Associated  
20 Indemnity breached their duty to defend Donahue Schriber when  
21 they abandoned their defense.

22 **VI. ONCE AN INSURER BREACHES ITS DUTY TO DEFEND IT HAS NO RIGHT**  
23 **TO COMPLAIN ABOUT HOW THE INSURED'S DEFENSE IS HANDLED**

24 Because National Surety and Associated Indemnity breached  
25 their duty to defend Donahue Schriber, they have no standing to  
26 challenge the manner in which Donahue Schriber was defended by  
27 Western Heritage. In the counterclaim National Surety and  
28 Associated Indemnity allege that Western Heritage should pay the

1 full amount of any judgment against Donahue Schriber. Their  
2 position is based upon the failure of Western Heritage to accept  
3 the global settlement demand of \$995,000 which allegedly was  
4 within the Western Heritage policy limit of \$1,000,000.

5 This counterclaim of National Surety and Associated  
6 Indemnity is without merit because case law precludes an insurer  
7 from challenging the manner in which a claim was handled, when  
8 the insurer that is challenging the claim handling has itself  
9 breached its duty to defend.

10 Courts universally agree that if an insurer breaches its  
11 duty to defend the insurer forfeits its right to control the  
12 defense. See 8 Appleman *Insurance Law and Practice* §36-41 4691  
13 and 49 ALR 2D 755.

14 The California Court of Appeal for the First District in  
15 *Drinnon v. Allstate Insurance Company*, 24 Cal.App.3d 571 (1972)  
16 specifically explained that once an insurer wrongfully refuses to  
17 defend, the insured is released from his or her obligations to  
18 leave the management of the claim to the insurer and the insured  
19 is then justified in proceeding on his or her own account in  
20 whatever manner seems proper under the circumstances. *Id.* at  
21 580. Additionally, the California Court of Appeal, First  
22 District in *North American Ins. Co. v. Insurance Company of North*  
23 *America*, 140 Cal.Rptr. 828 (1977) stated,

24 No insurer which deliberately breaches its  
25 obligation to the insured should be permitted  
26 thereby to profit, whether at the expense of  
27 the insured, or of an insurer which  
28 faithfully discharges its obligation. *Id.* at

835.

Consequently, because National Surety and Associated Indemnity clearly breached their duty to defend Donahue Schriber, their counterclaim against Western Heritage based on the failure of Western Heritage to accept the \$995,000 global settlement demand must be dismissed.

Additionally, based upon the undisputed facts of this case, when the \$8,615.49 workers' compensation lien is added to the \$995,000 global settlement demand, it is obvious that there was no opportunity that Western Heritage had to settle within its \$1,000,000 policy limit. The January 7, 2011 global settlement demand letter from counsel for plaintiff in the underlying action did not include payment of the workers' compensation lien. Therefore, the counterclaim of National Surety and Associated Indemnity must be dismissed on the additional basis that there was no opportunity for a global settlement within the \$1,000,000 Western Heritage policy limit.

**VII. WESTERN HERITAGE IS ENTITLED TO CONTRIBUTION FROM NATIONAL SURETY AND ASSOCIATED INDEMNITY FOR THE COSTS IT PAID TO DEFEND DONAHUE SCHRIBER**

According to this court's opinion in *Maryland Casualty Company v. National Fire & Marine Insurance Company*, a non-reported decision found at 2012 WL 320640 (D.Nev.2012), citing the California case of *Fireman's Fund Insurance Company v. Maryland Casualty Company*, 65 Cal.App.4<sup>th</sup> 1279 (2002), an insurer has standing to seek contribution from another insurer where the insurer's insure the same insured and cover the same risk. According to this court's decision in *Assurance Company of*

1 *America v. National Fire & Marine Insurance Company*, a non-  
2 reported decision at 2012 WL 2589883 (D.Nev.2012), contribution  
3 arises when several insurers are obligated to defend or indemnify  
4 the same loss or claim and one insurer has paid more than its  
5 share of the loss or defended the action without any  
6 participation by the others. Additionally, where multiple  
7 insurance carriers insure the same insured and cover the same  
8 risk, each insurer has independent standing to assert a cause of  
9 action against the co-insurers for equitable contribution when it  
10 has undertaken the defense or indemnification of the common  
11 insured.

12 Based upon the clear facts of the underlying case, Donahue  
13 Schriber should have been defended by three insurers. Western  
14 Heritage agreed to defend Donahue Schriber since it is possible  
15 that some of Donahue Schriber's liability was caused by Malco.  
16 Additionally, National Surety as Donahue Schriber's direct  
17 insurer had a duty to defend Donahue Schriber since it is  
18 possible that part of Donahue Schriber's liability arose from its  
19 own negligence. Furthermore, Associated Indemnity had a duty to  
20 defend Donahue Schriber since Donahue Schriber was an additional  
21 insured and it is possible that part of Donahue Schriber's  
22 liability was caused by the negligence of Papa John's Pizza who  
23 agreed to indemnify Donahue Schriber. Therefore, the defense  
24 fees and costs incurred by Western Heritage in defending Donahue  
25 Schriber in the underlying action should be apportioned two-  
26 thirds to the Fireman's Fund Companies, National Surety and  
27 Associated Indemnity, and one-third to Western Heritage.  
28 Likewise, the non-bond attorneys' fees and costs associated with



1 the appeal of Donahue Schriber and the attorneys' fees and costs  
2 for the retrial of damages in the underlying action should be so  
3 apportioned.

4 **VIII. NATIONAL SURETY AND ASSOCIATED INDEMNITY MUST PAY 90%**  
5 **OF THE DAMAGES AWARDED TO THE PLAINTIFF IN THE UNDERLYING**  
6 **ACTION**

7 Based upon the undisputed facts, the water leak which caused  
8 the algae on the sidewalk on which the underlying plaintiff  
9 Salinas slipped and fell emanated from Papa John's Pizza.  
10 Representatives of Papa John's Pizza and Donahue Schriber both  
11 knew about the water leak and the formation of algae on the  
12 sidewalk. Therefore, Papa John's Pizza as the tenant, and  
13 Donahue Schriber as the owner, both had a duty to protect  
14 individuals, including the underlying plaintiff Salinas, from  
15 this dangerous condition, i.e., algae on the sidewalk.

16 Malco allegedly had the responsibility for pressure washing  
17 the sidewalk. However, if Malco had an obligation to pressure  
18 wash this sidewalk, it was only required pursuant to the  
19 contract, to do so once a month. As soon as Malco would have  
20 cleaned the sidewalk, the whole algae growing process would have  
21 started again, because Papa John's Pizza did not stop the leak  
22 and Donahue Schriber ignored the hazard and allowed the leak to  
23 continue.

24 Donahue Schriber had a contract with Malco which required  
25 Donahue Schriber to be indemnified for liability imposed upon it  
26 due to the negligence of Malco. Additionally, Donahue Schriber  
27 had a lease with Papa John's Pizza which required Donahue  
28 Schriber to be indemnified for liability imposed upon it due to

1 the negligence of Papa John's Pizza.

2 The jury determined that Malco was 10% negligent and Donahue  
3 Schriber was 90% negligent. The negligence attributed to Donahue  
4 Schriber had to either come from its own negligence or Papa  
5 John's Pizza's negligence. It is absolutely logical that Donahue  
6 Schriber and Papa John's Pizza would have more negligence than  
7 Malco since Papa John's Pizza and Donahue Schriber allowed the  
8 leak to take place and continue and never fixed it while Malco  
9 was only required to wash the sidewalk once a month.

10 As explained above, the percentage of negligence apportioned  
11 to Donahue Schriber had to come from its own negligence for which  
12 it is not entitled to be indemnified by Malco or it arose from  
13 the negligence of Papa John's Pizza, in which Papa John's Pizza  
14 should be indemnifying Donahue Schriber. Furthermore, as  
15 explained herein, Donahue Schriber, the only party that could do  
16 so, filed a third-party complaint against Papa John's Pizza which  
17 was voluntarily dismissed with prejudice.

18 Why this was done was initially a mystery since it is not  
19 conceivable that Donahue Schriber would want to give up its  
20 indemnity rights against Papa John's Pizza, a party who is  
21 clearly negligent. The explanation lies in the fact that one  
22 Fireman's Fund insurer, National Surety, insured Donahue Schriber  
23 and another Fireman's Fund insurer, Associated Indemnity, insured  
24 Papa John's Pizza, and Fireman's Fund felt that it was bad  
25 litigation economics to file a third-party complaint against a  
26 party by whom it would have to defend and indemnify. The  
27 Fireman's Fund Companies, National Surety and Associated  
28 Indemnity, by manipulating and dismissing the third-party

1 complaint against Papa John's Pizza, acted inappropriately by  
2 sacrificing the indemnity rights of its insured, Donahue  
3 Schriber, in order to save defense costs.

4 The negligence of Papa John's Pizza would have been  
5 determined by the jury in the underlying action except for the  
6 dismissal of the third-party complaint at the direction of  
7 National Surety and/or Associated Indemnity, which are members of  
8 The Fireman's Fund Group of Insurance Companies. This dismissal  
9 was orchestrated by National Surety and/or Associated Indemnity  
10 for their own benefit.

11 The percentage of negligence apportioned to Donahue Schriber  
12 in the underlying action on the jury verdict is the result of  
13 Donahue Schriber's own negligence and/or the result of the  
14 negligence of Papa John's Pizza, not Malco's negligence which was  
15 apportioned at 10%.

16 If the Fireman's Fund Companies had maintained the Donahue  
17 Schriber third-party complaint against Papa John's Pizza, then  
18 Papa John's Pizza, through its Fireman's Fund insurer, would be  
19 indemnifying Donahue Schriber and Donahue Schriber would not be  
20 asserting an indemnity claim against Malco and Western Heritage.  
21 It is only because the Fireman's Fund insurer sacrificed Donahue  
22 Schriber's rights that Donahue Schriber is now looking towards  
23 Western Heritage to pay for negligence which belongs to one or  
24 both of the Fireman's Fund Insurance Companies insureds.

25 Consequently, the Fireman's Fund Insurance Companies,  
26 National Surety and/or Associated Indemnity, must be held  
27 responsible for indemnifying Donahue Schriber for all liability  
28 apportioned to Donahue Schriber without any contribution from

1 Western Heritage or Malco because the indemnity apportioned to  
2 Donahue Schriber is based upon Donahue Schriber's own negligence  
3 or the negligence of Papa John's Pizza.

4 Furthermore, based on the above indemnity analysis, the  
5 Fireman's Fund Companies, National Surety and/or Associated  
6 Indemnity, are responsible for paying the full amount of the cost  
7 of the appeal bond on behalf of Donahue Schriber without any  
8 contribution from Western Heritage.

9 **IX. CONCLUSION**

10 Based upon the undisputed facts and case law it is clear and  
11 there is no genuine issue of material fact regarding the breach  
12 of the duty to defend Donahue Schriber by National Surety and  
13 Associated Indemnity. Because of this breach the counterclaim of  
14 National Surety and Associated Indemnity must be dismissed  
15 because National Surety and Associated Indemnity have no standing  
16 to challenge the manner in which Western Heritage handled the  
17 defense of Donahue Schriber subsequent to National Surety and  
18 Associated Indemnity's breach of their duty to defend Donahue  
19 Schriber by abandoning the defense of Donahue Schriber when  
20 Western Heritage agreed to accept the defense of Donahue  
21 Schriber.

22 Furthermore, based on the undisputed facts and case law, it  
23 is clear and there is no genuine issue of material fact that  
24 National Surety and Associated Indemnity must (a) pay two-thirds  
25 of the defense fees and costs that Western Heritage incurred in  
26 defending Donahue Schriber in the underlying action, (b) must  
27 fully pay for the cost of the appeal bond posted on behalf of  
28 Donahue Schriber without any contribution from Western Heritage,

1 (c) must pay two-thirds of the non-bond related appeal attorneys'  
2 fees and costs pertaining to the appeal of Donahue Schriber, (d)  
3 must pay for two-thirds of Donahue Schriber's defense fees and  
4 costs pertaining to the new trial ordered by the Nevada Supreme  
5 Court concerning damages in the underlying action, and (e) must  
6 fully indemnify Donahue Schriber for the 90% liability  
7 apportioned to Donahue Schriber without any contribution from  
8 Western Heritage or Malco.

9 Since the total damages to be awarded to the plaintiff in  
10 the underlying action have not been finally determined and  
11 because attorneys' fees and costs are still being incurred for  
12 the defense of Donahue Schriber, Western Heritage at this time  
13 does not seek a specific damage award, but seeks a declaration  
14 from this court describing the contribution and indemnity owed by  
15 National Surety and Associated Indemnity. This court in *Great*  
16 *American Insurance Company of New York v. North American*  
17 *Specialty Insurance Company*, 541 F.Supp.2d 1203 (D.Nev.2008)  
18 acknowledged that a summary judgment could be rendered on  
19 liability issues alone. The court specifically stated,

20 The court agrees Plaintiff has not presented  
21 evidence showing what expenses it is entitled  
22 to as a matter of law. However, this lack of  
23 evidence does not affect this court's ability  
24 to find Defendant is liable for the expenses  
25 it should have contributed to the *Skender*  
26 action. See Fed.R.Civ.P. 56(d)(2) ("An  
27 interlocutory summary judgment may be  
28 rendered on liability alone, even if there is



1 a genuine issue on the amount of damages.");  
2 see also *Thoresen v. Lumbermens Mut. Casualty*  
3 *Co.*, 351 F.2d 573 (7<sup>th</sup> Cir. 1965)...

4 Accordingly, Western Heritage seeks this court's declaration  
5 by way of summary judgment that National Surety and Associated  
6 Indemnity are liable as described herein for contribution and  
7 indemnity and reserves its right to pursue an actual award of  
8 damages against National Surety and Associated Indemnity.

9 DATED: June 1, 2015

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10  
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ATTORNEYS AT LAW

CERTIFICATE OF SERVICE

I hereby certify that on the 1<sup>st</sup> day of June 2015, the foregoing MOTION FOR SUMMARY JUDGMENT ON BEHALF OF THE PLAINTIFF AND COUNTERDEFENDANT WESTERN HERITAGE INSURANCE COMPANY was served on all parties via the United States District Court CM/ECF system.

  
\_\_\_\_\_  
BONNIE KERKHOFF JUAREZ  
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